

State of Utah
Administrative Rule Analysis

NOTICE OF PROPOSED RULE OR CHANGE

The agency identified below in box 1 provides notice of proposed rule or change pursuant to Utah Code Subsections 646a-4(2) and (4). Please address questions regarding information on this notice to the agency. The full text of all rule filings is published in the *Utah State Bulletin* unless excluded because of space constraints. The full text of all rule filings may also be inspected at the Division of Administrative Rules.

State of Utah Division of Administrative Rules (DAR) 4120 State Office Building; 450 North Main PO Box 141007 Salt Lake City, UT 84114-1007 Phone: (801) 538-3218, FAX: (801) 538-1773 State E-mail: asdomain.asitmain.rules	DAR file no.: <hr/> Utah Admin. Code ref. (R no.): R156-38 <hr/> Date filed: _____ <hr/> Time filed: _____ <hr/> Received by: _____
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1. Department:	Commerce
Agency:	Occupational and Professional Licensing
Room no., building:	Heber M. Wells Building - 4th Floor
Street address:	160 East 300 South
Mailing address:	PO Box 146741
City, state ZIP:	Salt Lake City UT 84114-6741
Contact person:	Earl Webster
Telephone:	(801) 530-7632
FAX:	(801) 530-6511
Internet E-mail:	ewebster@utah.gov

(Interested persons may inspect this filing at the above address or at DAR between 8:00 a.m. and 5:00 p.m. on business days.)

2. Title of rule or section (catchline):
Residence Lien Restriction and Lien Recovery Fund Rules

3. Type of notice:

Proposed rules	____ New	X Amendment	____ Repeal
	Repeal and reenact _____		
Other rule types	Change in proposed rule _____ (changes original proposed rule file no.: _____)		

4. Purpose of the rule or reason for the change:
The Division and the Residence Lien Recovery Fund Advisory Board has determined that changes need to be made to the rule to (1) codify precedent setting decisions since the last rule amendment filing; (2) provide clear guidance to claimants on recurring issues; and (3) correct linguistic and technical errors.

5. This rule or change is a response to comments by the Administrative Rules Review Committee. ____ Yes X No
____ s ____

6. Summary of the rule or change:

Section 102-Definitions - A definition for "qualified services" was added. Section 105-Adjudicative Proceedings - Additions are being made to clarify denial and conditional denial procedures with respect to a claimant's application. Section 204: Added documents needed with respect to a nonlaborer claim if the contracting entity is a real estate developer. Change the word "independent evidence" through this section to "credible evidence" to set a legally defensible standard of evidence. Section 204d-Added wording with respect to claims wherein the claimant has had judgment entered against the nonpaying party and added a new paragraph with respect to claims wherein the nonpaying party's bankruptcy filing precluded the claimant from having judgment entered against the nonpaying party defining what costs would be applicable. Section 301 was changed to Section 301a. New Section 301b was added to specify what type of entity status change would require new registration in the Fund and to also clarify when a Fund registration is transferable. Section 401-Deleted "letter of credit" as an alternate security as required under Section 38-1-28.

7. Aggregate anticipated cost or savings to:

State budget:	The Division will incur minimal costs, approximately \$100, to reprint this rule once the proposed amendments have been made effective. Any costs incurred will be absorbed in the Division's current budget.
Local government:	Proposed rule amendments do not apply to local governments.
Other persons:	These proposed rule amendments will have no fiscal impact on any entity as the amendments codify existing Division policies and procedures and do not alter claim payment amounts. Therefore, all affected parties have already realized any cost increase or savings.

8. Compliance costs for affected persons ("person" means any individual, partnership, corporation, association, governmental entity, or public or private organization of any character other than an agency):

These proposed rule amendments will have no fiscal impact on any entity as the amendments codify existing Division policies and procedures and do not alter claim payment amounts. Therefore, all affected parties have already realized any cost increase or savings.

9. Comments by the department head on the fiscal impact the rule may have on businesses:

The additions of or changes to R156-38-102(8), R156-38-105(8)(b), R156-38-204d(4) and R156-38-301b all reflect Residence Lien Recovery Fund Board decisions and policy, and should create no business fiscal impact that industry has not already experienced. The remaining changes to the LRF rule create no business fiscal impact issues, as they are for the purpose of bringing the LRF rules into compliance with new statutory changes, or are otherwise procedural in nature. Ted Boyer, Executive Director

10. This rule or change is authorized or mandated by state law, and implements or interprets the following state and federal laws.

State code or constitution citations (required):	Section 38-11-101 and Subsections 58-1-106(1) and 58-1-202(1)
Federal citations (optional):	

11. This rule or change adds or updates an incorporated reference (submit a copy to DAR):

Yes ☒ No ☐

Reference title and date of issue or edition:

12. The public may submit written or oral comments to the agency identified in box 1. (The public may also request a hearing by submitting a written request to the agency. The agency is required to hold a hearing if it receives requests from ten interested persons or from an association having not fewer than ten members. Additionally, the request must be received by the agency not more than 15 days after the publication of this rule in the *Utah State Bulletin*. See Section 63-46a-5 and Rule R15-1 for more information.)

Comments will be accepted until 5:00 p.m. on (mm/dd/yyyy): 07/01/2002

A public hearing (optional) will be held on (mm/dd/yyyy): 06/12/2002 at (time): 8:00 a.m.

at (place): 160 East 300 South, South Conference Room (1st Floor), Salt Lake City, Utah

13. This rule or change may become effective on (mm/dd/yyyy): 07/02/2002

14. Indexing information - keywords (maximum of four, in lower case):

licensing, contractors, liens

15. Indexing information - affected industries (two-digit SIC codes):

n/a

16. Attach a WordPerfect document containing the text of this rule or change (filename):

R156-38.pr

To the agency: Information requested on this form is required by Sections 63-46a-4, 5, 6, and 10. Incomplete forms must be returned to the agency for completion, possibly delaying publication in the *Utah State Bulletin*, and delaying the first possible effective date.

AGENCY AUTHORIZATION

Agency head or designee, and title:	J. Craig Jackson, Director	Date (mm/dd/yyyy):	05/13/2002
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R156. Commerce, Occupational and Professional Licensing.

R156-38. Residence Lien Restriction and Lien Recovery Fund Rules.

R156-38-102. Definitions.

In addition to the definitions in Title 38, Chapter 11, Residence Lien Restriction and Lien Recovery Fund Act; Title 58, Chapter 1, Division of Occupational and Professional Licensing Act; and Rule R156-1, General Rules of the Division of Occupational and Professional Licensing, which shall apply to these rules, as used in these rules:

(1) "Claimant" means a person who submits an application or claim for payment from the fund.

(2) "Construction project", as used in Subsection 38-11-203(4), means all qualified services related to the written contract required by Subsection 38-11-204(3)(a).

(3) "Contracting entity" means an original contractor, a factory built housing retailer, or a real estate developer that contracts with a homeowner.

(4) "Homeowner" means the owner of an owner-occupied residence.

(5) "Necessary party" includes the division, on behalf of the fund, and the claimant.

(6) "Owner", as defined in Subsection 38-11-102(15), does not include any person or developer who builds residences that are offered for sale to the public.

(7) "Permissive party" includes a licensee or qualified beneficiary who will be required to reimburse the fund if a claimant's claim is paid from the fund.

(8) "Qualified services", as used in Subsection 38-11-102(18) do not include:

(a) services provided by the claimant to cure a breach of the contract between the claimant and the nonpaying party; or

(b) services provided by the claimant under a warranty or similar arrangement.

R156-38-105. Adjudicative Proceedings.

(1) The classification of adjudicative proceedings initiated under Title 38, Chapter 11 is set forth at Sections R156-46b-201 and R156-46b-202.

(2) The identity and role of presiding officers for adjudicative proceedings initiated under Title 38, Chapter 11, is set forth in Sections 58-1-109 and R156-1-109.

(3) Issuance of investigative subpoenas under Title 38, Chapter 11 shall be in accordance with Subsection R156-1-110.

(4) Adjudicative proceedings initiated under Title 38, Chapter 11, shall be conducted in accordance with Title 63, Chapter 46b, Utah Administrative Procedures Act, and Rules R151-46b and R156-46b, Utah Administrative Procedures Act Rules for the Department of Commerce and the Division of Occupational and Professional Licensing, respectively, except as otherwise provided by Title 38, Chapter 11 or these rules.

(5) Claims shall be filed with the division and served upon all necessary and permissive parties.

(6) Service of claims or other pleadings by mail to a qualified beneficiary of the fund addressed to the address shown on the division's records with a certificate of service as required by R151-46b-8, shall constitute proper service. It shall be the responsibility of each registrant to maintain a current address with the division.

(7) A permissive party is required to file a response to a claim against the fund within 30 days of notification by the division of the filing of the claim, to perfect the party's right to participate in the adjudicative proceeding to adjudicate the claim.

(8)

(a) [The]For informal claims, findings of fact and conclusions of law [established by a judgment] entered by a civil court or state[a final order entered by an administrative] agency submitted in support of or in opposition to a claim against the fund shall not be subject to readjudication in an adjudicative proceeding to adjudicate the claim.

(b) For formal claims, a claim or issue resolved by a prior judgment, order, findings of fact, or conclusions of law entered in by a civil court or a state agency submitted in support of or in opposition to a claim against the fund shall not be subject to readjudication with respect to the parties to the judgment, order, findings of fact, or conclusions of law.

(9) A party to the adjudication of a claim against the fund may be granted a stay of the adjudicative proceeding during the pendency of a judicial appeal of a judgment entered by a civil court or the administrative or judicial appeal of an order entered by an administrative agency provided:

(a) the administrative or judicial appeal is directly related to the adjudication of the claim; and

(b) the request for the stay of proceedings is filed with the presiding officer conducting the adjudicative proceeding and concurrently served upon all parties to the adjudicative proceeding, no later than the deadline for filing the appeal.

(10)

(a) A written notice of denial of claim shall be provided to a claimant who submits a complete application if the division determines that the claim does not meet the requirements for payment.

(b) A written notice of incomplete application and conditional denial of claim shall be provided to a claimant who submits an incomplete application. The notice shall advise the claimant that the application is incomplete and that the application is denied, unless the claimant corrects the deficiencies within the time period specified in the notice and the claim otherwise meets all qualification for payment.

Documents and Information.

The following supporting documents shall, at a minimum, accompany each nonlaborer claim for recovery from the fund:

(1) one of the following:

(a) a copy of the written contract between the homeowner and the contracting entity; or

(b) a copy of a civil judgment containing a finding that the homeowner entered into a written contract in compliance the requirements of Subsection 38-11-204(3)(a);

(2)

(a) if the claim involves an original contractor, documentation issued by the division that the original contractor is licensed or exempt from licensure under Title 58, Chapter 55, Utah Construction Trades Licensing Act;

(b) if the contracting entity is a real estate developer:

(i) credible evidence that the contracting entity had an ownership interest in the property;

(ii) a copy of the contract between the contracting entity and the contractor that built the residence or other credible evidence showing the existence of such a contract and setting forth a description of the services provided to the contracting entity by the contractor; and

(iii) credible evidence that the real estate developer offered the residence for sale to the public;

(3) one of the following:

(a) an affidavit from the contracting entity acknowledging that the homeowner paid the contracting entity in full in accordance with the written contract and any amendments to the contract;

(b) a copy of a civil judgment containing a finding that the homeowner paid the contracting entity in full in accordance with the written contract and any amendments to the contract; or

(c) documentation that the claimant has been prevented from satisfying Subsections (a) and (b), together with ~~[independent]~~credible evidence establishing that the homeowner paid the contracting entity in full in accordance with the written contract and any amendments to the contract;

(4) one or more of the following as required:

(a) a copy of an action date stamped by a court of competent jurisdiction filed by the claimant against a contracting entity or subcontractor as described in Subsection 38-11-204(3)(c) to recover monies owed for qualified services performed on the owner-occupied residence, filed within 180 days from the date the claimant last provided qualified services; or

(b) a copy of the Notice of Commencement of Action filed with the division; or

(c) documentation that a bankruptcy filing by the contracting entity or subcontractor prevented claimant from satisfying Subsections (a) and (b);

(5) one of the following:

(a) a copy of a civil judgment entered in favor of claimant against the contracting entity or subcontractor containing a finding that the contracting entity or subcontractor failed to pay the claimant pursuant to

their contract with the claimant and any amendments to the contract; or

(b) documentation that a bankruptcy filing by the contracting entity or subcontractor prevented the claimant from obtaining such a civil judgment, together with [~~independent~~]credible evidence establishing that the contracting entity or subcontractor failed to pay the claimant pursuant to their contract with the claimant and any amendments to the contract;

(6) one or more of the following as required:

(a) a copy of a supplemental order issued following the civil judgment entered in favor of claimant and a copy of the return of service of the supplemental order indicating either that service was accomplished on the contracting entity or subcontractor or that said contracting entity or subcontractor could not be located or served;

(b) a writ of execution issued if any assets are identified through the supplemental order or other process, which have sufficient value to reasonably justify the expenditure of costs and legal fees which would be incurred in preparing, issuing, and serving execution papers and in holding an execution sale; or

(c) documentation that a bankruptcy filing or other action by the contracting entity or subcontractor prevented the claimant from satisfying Subparagraphs (a) and (b);

(7) certification that the claimant is not entitled to reimbursement from any other person at the time the claim is filed and that the claimant will immediately notify the presiding officer if the claimant becomes entitled to reimbursement from any other person after the date the claim is filed; and

(8) one of the following:

(a) an affidavit from the homeowner establishing that he is an owner as defined in Subsection 38-11-102(15) and that the residence is an owner-occupied residence as defined by Subsection 38-11-102(16);

(b) a copy of a civil judgment containing a finding that the homeowner is an owner as defined by Subsection 38-11-102(15) and that the residence is an owner-occupied residence as defined by Subsection 38-11-102(16); or

(c) documentation that the claimant has been prevented from obtaining an owner-occupied residence affidavit together with [~~independent~~]credible evidence establishing that the homeowner is an owner as defined by Subsection 38-11-102(15) and that the residence is an owner-occupied residence as defined by Subsection 38-11-102(16).

(9) one or more of the following:

(a) a copy of invoices setting forth a description of, the performance dates of, and the value of the qualified services claimed;

(b) a copy of a civil judgment containing a finding setting forth a description of, the performance dates of, and the value of the qualified services claimed; or

(c) [~~independent~~]credible evidence setting forth a description of, the performance dates of, and the value of the qualified services claimed.

(10) In claims in which the presiding officer determines that the claimant has made a reasonable but unsuccessful effort to produce all documentation specified under this rule to satisfy any requirement to recover from the fund, the presiding officer may elect to accept the evidence submitted by the claimant if the requirements to recover from the

fund can be established by that evidence.

(11) A separate claim must be filed for each residence and a separate filing fee must be paid for each claim.

R156-38-204d. Calculation of Costs, Attorney Fees and Interest for Payable Claims.

(1) Payment for qualified services, costs, and interest shall be made as specified in Section 38-11-203.

(2) When a claimant requests payment of multiple claims supported by a single judgment or other common documentation and the judgment or documentation does not differentiate costs and attorney fees by owner-occupied residence, the amount of costs and attorney fees shall be allocated among the related claims using the following formula: (Qualified services attributable to the owner-occupied residence divided by Total qualified services awarded as judgment principal or total documented qualified services) x Total costs or total attorney fees.

(3) For claims determined by the division to be payable from the fund, the division shall order payment of attorney fees in an aggregate amount not exceeding the following:

(a) If a civil judgment awards a specific dollar amount for attorney fees, the division shall order payment as ordered in the civil judgment, to the extent that the attorney fees are attributable to the owner-occupied residence at issue in the claim.

(b) Otherwise, the division shall order payment of reasonable attorney fees, documented according to the provisions of Rule 4-505, Utah Code of Judicial Administration, subject to the following limitations:

(i) if the payable amount of qualified services is \$3,000 or less, not more than 33% of the value of the qualified services and not exceeding \$750;

(ii) if the payable amount of qualified services is greater than \$3,000 and \$10,000 or less, not more than 25% of the value of qualified services and not exceeding \$2,000; or

(iii) if the payable amount of qualified services is greater than \$10,000, attorney fees in an amount of not more than 20% of the value of qualified services and not exceeding \$7,000.

(iv) The above limits may be waived by the director in those unique claims where manifest injustice would otherwise result. The burden is on the claimant to demonstrate manifest injustice.

(4)

(a) For claims wherein the claimant has had judgment entered against the nonpaying party, [—P] post-judgment costs shall be limited to those costs allowable by a district court, such as costs of service, garnishments, or executions, and shall not include postage, copy expenses, telephone expenses, or other costs related to the preparation and filing of the claim application.

(b) For claims wherein the nonpaying party's bankruptcy filing precluded the claimant from having judgment entered against the nonpaying party, total costs shall be limited to those costs that would have been allowable by the district court had judgment been entered, such as, but not limited to, costs of services, garnishments, or executions, and shall not include postage, copy expenses, telephone expenses, or other costs related

to the preparation and filing of the claim application.

R156-38-301a. Contractor Registration as a Qualified Beneficiary - All License Classifications Required to Register Unless Specifically Exempted - Exempted Classifications.

(1) All license classifications of contractors are determined to be regularly engaged in providing qualified services for purposes of automatic registration as a qualified beneficiary, as set forth in Subsections 38-11-301(1) and (2), with the exception of the following license classifications:

TABLE II

Primary Classification Number	Subclassification Number	Classification
E100		General Engineering Contractor
	S211	Boiler Installation Contractor
	S213	Industrial Piping Contractor
	S262	Granite and Pressure Grouting Contractor
S320		Steel Erection Contractor
	S321	Steel Reinforcing Contractor
	S322	Metal Building Erection Contractor
	S323	Structural Stud Erection Contractor
S340		Sheet Metal Contractor
S360		Refrigeration Contractor
S440		Sign Installation Contractor
	S441	Non Electrical Outdoor Advertising Sign Contractor
S450		Mechanical Insulation Contractor
S470		Petroleum System Contractor
S480		Piers and Foundations Contractor
I101		General Engineering Trades Instructor
I102		General Building Trades Instructor
I103		General Electrical Trades Instructor
I104		General Plumbing Trades Instructor
I105		General Mechanical Trades Instructor

(2) Any person holding a license requiring registration in the fund that is on inactive status on the assessment date of any special assessment of the fund, shall be exempt from payment of that specific assessment and any assessment made during the time the license remains on inactive status and the licensee does not engage in the licensed occupation or profession.

(3) Before a licensee on inactive status, who would otherwise be required to pay an assessment, can be reinstated to an active status, the licensee must pay:

(a) the initial assessment of \$195 assessed July 1, 1995, if that assessment has never been paid by that licensee; and

(b) the most recent special assessment immediately preceding the date on which the license is reinstated to active status.

R156-38-301b. Event Necessitating Registration - Name Change by Qualified Beneficiary - Reorganization of Registrant's Business Type - Transferability of Registration.

(1) Any change in entity status by a registrant requires registration with the Fund by the new or surviving entity before that entity is a qualified beneficiary.

(2) The following constitute a change of entity status for purposes of Subsection (1):

(a) creation of a new legal entity as a successor or related-party entity of the registrant;

(b) change from one form of legal entity to another by the registrant; or

(c) merger or other similar transaction wherein the existing registrant is acquired by or assumed into another entity and no longer conducts business as its own legal entity.

(3) A qualified beneficiary registrant shall notify the division in writing of a name change within 30 days of the change becoming effective. The notice shall provide the following:

(a) the qualified beneficiary's prior name;

(b) the qualified beneficiary's new name;

(c) the qualified beneficiary's registration number; and

(d) proof of registration with the Division of Corporations and Commercial Code as required by state law.

(4) A registration shall not be transferred, lent, borrowed, sold, exchanged for consideration, assigned, or made available for use by any entity other than the registrant for any reason.

(5) A claimant shall not be considered a qualified beneficiary registrant merely by virtue of owning an entity that is a qualified beneficiary.

R156-38-401. Requirements for a Letter of Credit and/or Evidence of a Cash Deposit as Alternate Security for Mechanics' Lien.

To qualify as alternate security under Section 38-1-28[+:

~~(1) A "letter of credit" must be issued by a federally insured depository institution and satisfy the requirements of Section 70A-5-101, et seq.~~

~~(2) "E] "evidence of a cash deposit" must be an account at a federally insured depository institution that is pledged to the protected party and is payable to the protected party upon the occurrence of specified conditions in a written agreement.~~

KEY: licensing, contractors, liens

~~[September 17, 2001]~~2002

Notice of Continuation April 6, 2000

38-11-101

58-1-106(1)

58-1-202(1)